STATE OF MICHIGAN

COURT OF APPEALS

HESSLEY HEMPSTEAD,

Plaintiff-Appellant,

v

DETROIT LIONS, INC., and LIBERTY MUTUAL INSURANCE CO.,

Defendants-Appellees.

UNPUBLISHED
January 3, 2003

No. 239817
WCAC
LC No. 01-000162

Before: Griffin, P.J., and White and Murray, JJ.

WHITE, J. (*dissenting*).

I respectfully dissent. I do not agree with the majority's dispositive conclusion that the Bert Bell/Pete Rozelle NFL Player Retirement Plan (PRP) is silent on the question of coordination. Rather, the language of the plan evinces an intent to preclude coordination for those who first make application in the 1993 plan year or later, and is, at a minimum, ambiguous. Further, the intent of the parties, as found by the magistrate, is supported by the record.

Article 6 of the agreement provides:

> **Line–of-Duty Disability**
>
> 6.1 **Line-of-Duty Disability Benefits.** Any Player who incurs a "substantial disablement" (as defined in Section 6.4(a) and (b)) "arising out of League football activities" (as defined in Section 6.4(c)) will receive a monthly line-of-duty disability benefit equal to the greater of (a) the sum of the Player's Benefit Credits at the date the Player's disability qualifies as a substantial disablement, including, if applicable, the scheduled Benefit Credit, as provided in Section 1.10(c)(3), for the Plan Year in which the disability that subsequently qualifies as a substantial disablement, is incurred, and (b) $1,000. The benefit will be payable monthly, beginning as of the first day of the month following the date the disability qualifies as a substantial disablement, and continuing for the duration of the substantial disablement but not for longer than 90 months.
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> * * *

6.3 **Procedures.** Any claim for line-of-duty disability benefits must be submitted in writing to the Plan Director within 48 months after a Player ceases to be an Active Player, but this period will be tolled for any period of time during which such Player is found by the Retirement Board to be physically or mentally incapacitated in a manner that substantially interferes with the filing of such claim.

The Retirement Board will determine a Player's substantial disablement, and may, but need not, rely on reports from a physician or physicians approved by the Retirement Board. The examined Player will pay the expense of the first examination, but the Plan will reimburse the Player if the Player qualifies for line-of-duty disability benefits. . . .

6.4 **Definitions.**

(a) A "substantial disablement" is a "permanent" disability that:

(1) Results in a partial bodily disability of 50% or more; or the loss of 50% or more of speech or sight; or 50% or more loss of the use of the neck or back; or

(2) Results in 55% or more loss of use of the hearing or an arm, shoulder, leg or hip; or

(3) Results in 70% or more loss of use of a hand, wrist, elbow, foot, ankle or knee; or

(4) Is the primary or contributory cause of the surgical removal or major functional impairment of a vital bodily organ or part of the central nervous system.

(b) A disability will be deemed to be "permanent" if it has persisted or is expected to persist for at least 12 months from the date of its occurrence and was the most significant factor in the Player's retirement from League football.

(c) "Arising out of League football activities" means a disablement arising out of any League pre-season, regular-season, or post-season game, or any combination thereof, or out of League football activity supervised by an Employer, including all required or directed activities. "Arising out of League football activities" does not include, without limitation, any disablement resulting from other employment, or athletic activity for recreational purposes.

6.5 **Applicability and Special Rules.** The above provisions of this Article 6 will apply to Players who first make application for line-of-duty disability benefits in the 1993 Plan Year or later and who earn a Credited Season in 1993 or later. Players not described in the preceding sentence are subject to the following special rules:

(a) 60 months is substituted for 90 months in Section 6.1.

(b) 36 months is substituted for 48 months in Section 6.3.

(c) The following sentence is added to the end of Section 6.1: "A Player's monthly line-of-duty disability benefit will be reduced by the payment for that month or the monthly equivalent of any lump sum payment for the same disablement which the Player receives as worker's compensation."

(d) 60% is substituted for 55% in Section 6.4(a)(2).

(e) 80% is substituted for 70% in Section 6.4(a)(3).

(f) The phrase "and has resulted in" is substituted for the phrase "and was the most significant factor in" in Section 6.4(b).

(g) The following sentence is substituted for the final sentence in Section 6.4(c): "'Arising out of League football activities' will not include any disablement resulting from other employment or activity initiated by the Player outside of official pre-season training, including athletic activity for recreation or for the general purpose of maintaining or achieving playing condition."

MCL 418.354(14) clearly provides that a disability pension plan may provide that the payments under that plan shall not be coordinated pursuant to that section. The question is thus whether the PRP provides that payments under the PRP shall not be coordinated. Section 6.1 of the PRP provides that in the event a player incurs a substantial disability as defined, he will receive a monthly payment equal to the greater of the sum of his benefit credits or $1000. Payments are limited to ninety months. The procedures for making a claim are set forth, and "substantial disablement," "permanent" and "arising out of League football activities" are defined. The PRP then provides that these provisions only apply to those who, like plaintiff, first seek benefits in 1993 or later. Special rules modifying the various formulas and requirements are set forth for those who do not first seek benefits in 1993 or later. Thus, the formula set forth in section 6.1 applies to plaintiff and states the amount he is to receive. For those who do not first seek benefits in 1993 or later, the provisions are modified so that the duration of benefits is confined to sixty months, and the monthly benefit otherwise set forth in section 6.1 is reduced by the amount of worker's compensation received.

To be sure, the PRP does not state "For claims first made in 1993 or later, disability benefits will not be reduced by payments received as worker's compensation." It does not, however, follow that the PRP is silent on the question whether such benefits are to be coordinated. Article 6 of the PRP was clearly intended to be read as a whole, and should be so read in determining whether it provides that payments under the plan shall not be coordinated. *Murphy v Pontiac*, 221 Mich App 639, 643; 561 NW2d 882 (1997), *Sterner v McLouth Steel Products*, 211 Mich App 354, 355-356; 536 NW2d 225 (1995), and *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993), relied on by the majority, do not compel affirmance. These cases stand for the propositions that where the plan is silent on the subject, benefits are coordinated, and that silence does not create ambiguity. However, in none of these cases did the plan, or in *Norman* the judgment, purport to address the subject of coordination. These cases are

not helpful in determining whether the instant plan is in fact silent on the subject of coordination. In sum, I do not agree that "[a]cceptance of the magistrate's conclusion would in no uncertain terms require us to ignore the language in the PRP actually agreed to by the parties, and in doing so rely on what after-the-fact testimony establishes as the parties' 'intent.'" Rather, I conclude that the PRP itself evinces an intent to afford monthly benefits in the amount of the greater of the player's benefit service credits or $1000, unless the player first made application before 1993, in which case that sum shall be reduced by payments received as worker's compensation. Notwithstanding this construction, article 6 may indeed be ambiguous, but it is not silent.

I would reverse and remand for consideration of defendants' remaining arguments not addressed by the WCAC.

/s/ Helene N. White